

[Translation from Polish]

Ministry for Regional Development

**IMPLEMENTATION OF PROJECTS FINANCED
UNDER THE EEA FINANCIAL MECHANISM AND THE NORWEGIAN FINANCIAL
MECHANISM -
PARTNERSHIP FORMATION AND OPERATION***

Warsaw, November 2005

*Material prepared on the basis of an expert report made by the Sienna Group at the commission of the Ministry of Economic Affairs and Labour.

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I TYPES OF PARTNERSHIP, LEGAL BASE FOR THEIR FORMATION, CONCLUDING AGREEMENTS AND THE RULES OF TRANSFERRING FUNDS UNDER THE PARTNERSHIP

The way of applying for financing under the Financial Mechanism of the European Economic Area (EEA) and the Norwegian Financial Mechanism, consisting in the reimbursement of expenses incurred to implement a project, implies that the project promoters applying for financing should submit within open call for proposals individual projects or programs that are operationally mature. In the case of project promoter establishing a partnership, this means that the partnership should have a specified organisational form and be prepared to start project implementation on the day the Donor States make their commitment .

1. Public-private partnership

1.1 Cooperation between national public entities

Cooperating entities

Under Polish law, *public sector institutions* (as the potential beneficiaries of the Financial Mechanisms) are legal entities and organisational entities without legal personality, located in the public finance sector on the basis of art. 5 of the Act of 28th November 1998 *on public finances*, i.e.:

1. public authority bodies, government administration bodies, state inspection bodies and law enforcement bodies, courts and tribunals as well as regional and local government entities, their bodies and unions;
2. budget entities, budget factory units and auxiliary enterprises of budget entities;
3. special purpose funds;
4. state universities;
5. research and development entities;
6. independent public health care institutions;
7. state as well as regional and local government cultural institutions;
8. Social Insurance Agency (ZUS), Agricultural Social Insurance Fund and funds managed by them;
9. National Health Fund;
10. Polish Academy of Sciences and organisational entities formed by it.;
11. state or regional and local government legal entities created on the basis of other acts, in order to perform public tasks.

Scope of cooperation

In the case of public entities, a constitutional obligation to operate through public authority bodies, on the basis of and within the limits of law, means that they can establish co-operation in order to implement projects within the priority areas of Financial Mechanisms - only if the activities listed in the priority areas fall within the scope of their powers as provided by the law. To take up cooperation, both national public entities must have powers in a priority area of the Financial Mechanisms. The powers of a public entity may take the form of an specific power (individual task) or a delegated power exercised in accordance with applicable provisions of law (a commissioned task from the scope of government administration).

All the entities mentioned above can act as public project promoters, provided that they have powers under statute in the priority areas defined in the Financial Mechanisms.

Activities in the priority areas of the Financial Mechanisms are performed to a greater or lesser extent by vast majority of the public finance sector entities listed in art. 5 of the *Act on public finances*. Only the Social Insurance Agency (ZUS), the Agricultural Social Insurance Fund and the funds administered by them' as well as the National Health Fund, have no grounds to participate in public partnerships implementing projects in the priority areas of the Mechanisms, as they do not execute any operations in the priority areas.

Remaining public finance sector entities, in particular government administration bodies, regional and local government entities, their bodies and unions, state and regional and local government cultural institutions, research and development entities and state or regional and local government legal persons located in the public finance sector, depending on the provisions regulating the objects of their activity, constitute, due to the nature of their public tasks, a group of entities enabled to take up cooperation in order to implement projects falling within the priority areas of the Financial Mechanisms.

The Municipal authority and its organisational units

Pursuant to the Act of 8th March 1990 on *municipal authorities* (Journal of Laws of 2001, no. 142, item 1591, as amended) the scope of activity of a municipal authority (Gmina) includes all public matters of local significance, which are not reserved under statute to other entities.

Pursuant to the provisions of the Act on municipal authorities and the Act on communal economy, a municipal authority (its entities) is entitled to participate in the performance of any public tasks aimed at collective needs of the regional and local government community, provided that the performance has not been reserved for the competence of other bodies. The municipal authority is also required to perform these of the tasks serving the needs of regional and local -government community, that are its own tasks. Furthermore, a municipal authority may apply to Powiat to be delegated the tasks that fall

within the Poviats' powers, on terms laid down in an agreement. This means that even if a task is reserved to regional or local government entity of higher level, a municipal authority may take over this entity's task on the basis of an agreement.

A comparison of the list of the municipal authority's own tasks and the scope of the priority areas of the Financial Mechanisms leads to the conclusion that the municipal authority and its organisational entities may enter into cooperation without any limitations in order to implement projects falling within the priority areas, except the following: implementing the Schengen provisions, supporting the Schengen National Action Plans, strengthening the judiciary and technical assistance in implementing the *acquis*.

Poviat and voivodship - regional and local government

Regional and local government entities of Poviat and Voivodship levels, and their unions, perform public tasks, specified under statute, of supra-municipality significance (in the case of poviats) or voivodship significance, not reserved under statute to government administration bodies.

A comparison of the list of tasks of the poviat and voivodship – regional and local government with the list of priority areas of the *Financial Mechanisms*, leads to the conclusion that the poviat and voivodship entities may enter into cooperation, in order to implement projects falling within the priority areas, with the exception of the following: implementing the Schengen provisions, supporting the Schengen National Action Plans, strengthening the judiciary and technical assistance in implementing the *acquis*.

Forms of cooperation

Public authority bodies, government administration bodies, state inspection bodies and law enforcement bodies, as well as regional and local government entities may conclude agreements within their competencies specified in the provisions of law. The subject-matter of such an agreement may refer to delegation of matters falling within a body's powers (including the performance of specified tasks of that body) to another public administration entity.

Regulations also provide for a possibility to conclude administration agreements between public administration bodies (where there is no route for performing a task under the hierarchy of bodies) - between state administration bodies and regional and local government entities, and between regional and local government entities of various levels.

Municipal authorities may create **inter-municipal associations** for the joint performance of public tasks by resolution of the councils of the interested municipal authorities (art. 64. 1 of the *Act of 8th March 1990 on municipal authorities*) and conclude **inter-municipal agreements** on delegation of specified public tasks to one of them (art. 74(1) of the cited Act). Furthermore, the *Act on municipal authorities* provides that in order to support the idea of regional and local government and defend their

mutual interests, regional or local authorities may form **associations**, also with poviats and voivodships. The provisions of the Act of 7th April 1989 - *Law on associations* (Journal of Laws of 2001 no. 79, item 855) apply accordingly to municipal authority associations, although at least 3 founders are required to establish an association.

A POVIAT may conclude an agreement on delegating the conduct of public tasks with regional and local government entities and with the voivodship in which it is located (art. 6(1) of the *Act of 5th June 1998 on poviat authorities*).

A VOIVODSHIP may conclude an agreement on delegating the conduct of public tasks with other voivodships and local government entities within the voivodship's area (art. 8(1) of the Act of 5th June 1998 on voivodship authorities). Furthermore, voivodships may form associations, also with municipal and poviat authorities. The provisions of the Act of 7th April 1989 – *Law on associations* (Journal of Laws of 2001 no. 79, item 855) apply accordingly to such associations and as in the case of municipal authorities, at least 3 founders are required to establish an association of regional and local government entities.

Alongside with the delegation of public tasks, administration agreements between public administration bodies may also concern a decision on joint performance of a specified task, if the performance thereof serves to perform the tasks of each of these bodies.

Public administration (regional and local government as well as state government) bodies may conclude agreements and form associations for the purposes of implementing their tasks.

Expenditure of funds

The basis for transfer of funds between public partners be e.g. an agreement. If the agreement concerns the delegation of a task by a body to an entity, where provisions do not provide for performance thereof by such entity, the body shall also transfer funds for its financing following the delegation of the task to such entity. If the agreement concerns joint performance of a public task, all parties to the agreement will participate in the costs of its performance.

The provisions of the *Act on public finances* permit the tasks performed jointly by regional and local government entities to include their own tasks and the tasks taken by such entities for performance by an agreement.

Pursuant to art. 124(11) of the Act, income and expenses connected with the performance of joint tasks performed by way of agreement between regional and local government entities fall within the budget of the regional and local government entity entrusted to perform the tasks. In the case of a municipal authority, if it performs public tasks falling within an agreement, it takes over the rights and obligations of the other municipal authorities – parties to the agreement, that relate to

the entrusted tasks. The municipal authorities parties to the agreement are required to participate in the costs of performance of the task entrusted.

However, if for the purpose of joint performance of a task municipal authorities create an inter-municipal authority association, the association will perform the public task on its own behalf and at its own liability, within the statutory purposes for which it was created, due to the fact that it has legal personality. On the date of publishing association's statute, the rights and obligations of municipal authorities participating in the inter-municipal authority association relating to the performance of tasks assigned to the association, pass to the association which then performs financial administration pursuant to the rules laid down by the *Act on public finances* for the financial administration of municipal authorities.

In the case of the public finance sector entities financed from the state budget, the *Act on public finances* does not provide for the restriction arising from art. 124 for regional and local government entities – the parties to the agreement may decide on partial financing of the task from the budgets of each of the interested entities.

In the case of an administrative agreement on joint performance of a public task between state administration bodies being public finance sector entities without legal personality, acting within the legal personality of the State Treasury, public tasks are financed under the budgets (financial plan) of the given entities, without any civil law obligations arising.

In summary:

- **If an entity of public finance sector enters into an agreement with another entity of this sector, referring to the performance of tasks of such entities, funds are transferred for the performance in accordance with art. 69(4)(1)(a) or (c) of the *Act on public finances*, depending on whether the task to be performed constitutes a government administration task or other tasks delegated to regional and local government entities by statute or whether an agreement relates to current own tasks of regional and local government entities.**
- **Public finance sector entities with legal personality (pursuant to art. 33(1) of the Civil Code) may conclude agreements as well, also with other public finance sector entities as contractors. These agreements, as remunerable, should however be concluded in accordance with the Public Procurement Law and therefore aren't recommended as legal form of cooperation between public finance sector entities.**

Public finance sector entities interested in cooperation in the performance of a specified task may also, by way of an contract or agreement, decide on the performance of this task by awarding a joint contract, as referred to in art. 16 (1) of the Act – *Public Procurement Law*. Pursuant to this provision, entities bound to apply public procurement procedures for the purchase of supplies, services or

building works may reach an agreement, jointly conduct proceedings and award a contract, appointing from among themselves one entitled to conduct proceedings and award the contract on their behalf. Joint award of a contract can apply to any awarding entity and any contract – this provision does not require fulfilment of any conditions in order to be applied, the contract can be awarded on the basis of an agreement in any circumstances.

The entity entitled to conduct the proceedings acts as the proxy of the remaining entities interested in the joint performance of the task and effectively incurs liabilities for all them. This way of performing a joint task requires the funds to be transferred between the budgets of entities interested in the joint performance of the task – the entitled entity concludes the contract on the behalf of each of them, and each of the entities awarding the joint contract pays its share of the remuneration to the contractor chosen in the proceedings.

When awarding a joint contract, for the sake of simplifying the contracting procedures, entities may decide that each of them will take up proceedings to conclude the agreement individually and demand that partial invoices are issued for the performance of the task, in amounts attributable to each of them, pursuant to the rules for co-financing the task laid down in the agreement.

This means of implementing actions under the Financial Mechanisms may be applied to selecting external contractors for tasks commissioned by the Partnership (particular members thereof) rather than to the selection of public partners of the Partnership. By way of the procedures for joint public contracts, public Partners may also select private partners for implementing Financial Mechanisms operations.

CONCLUSIONS

- 1. Creation of public-private partnerships can be effectuated by public finance sector entities to whom relevant provisions of the material public-law assign performance of public tasks situated within the priority areas of the Finance Mechanisms*
- 2. Among public finance sector entities, the only entities having no grounds for participating in partnerships are the Social Insurance Agency (ZUS) and the Agricultural Social Insurance Fund along with the funds administered by them, as well as the National Health Fund, due to the fact that they do not perform any of the tasks falling within the Finance Mechanisms.*
- 3. The scope of municipal authorities own tasks indicates that the municipal authorities and its organisational entities may take up cooperation in order to implement projects falling within most of the priority areas, with the exception of implementing Schengen provisions,*

supporting the National Action Plan from Schengen, strengthening the judiciary and technical assistance in implementing the acquis.

- 4. Poviats and voivodship authorities may take up co-operation to implement projects falling within the following priority areas: environmental protection, promotion of sustainable development, protection of European cultural heritage, public transport, urban renewal, development of human resources in public administration, health care and child care, regional policy and cross-border activities.*
- 5. Regional and local government as well as state government administration entities may conclude agreements and form associations for the purposes of implementing the tasks under the Financial Mechanisms.*
- 6. In the event of concluding an agreement, funds for implementing the tasks covered thereby shall be transferred on the basis of art. 69 (4)(1)(a) or (c) of the Act on public finances,*
- 7. An administration entity may select the contractor of a task falling within the Mechanisms in accordance with public procurement provisions and conclude a remunerable agreement. However, if the contractor would be another administration entity, this procedure is not recommended. The public procurement provisions should be applied where a contractor being selected is external to the administration.*

1.2 Cooperation of a national public entity with a foreign public entity

Public finance sector entity can take up co-operation with a foreign entity only if there is a clear legal basis for such co-operation.

Despite Poland's ratification of the European Framework Convention on cross-border co-operation between communities and local authorities (Journal of laws of 1993 no. 61 item 288), the Convention can not constitute a basis for free undertaking of cooperation in the public sector. Any cooperation undertaken must be based on national provisions, i.e. „government agreements” and Act of 15th September 2000 *on the rules by which regional and local government entities shall enter international regional and local community associations* (Journal of laws of 2000 no. 91, item 1009 as amended). Even though the above act does not restrict regional and local government entities' possibility of undertaking bilateral cooperation, it does incorporate provisions into constitutional acts on regional and local government, which are limiting the ability of regional and local government entities to organise and associate in transnational relations.

Cooperation of public entities at a transnational scale may occur on the basis of:

- public law provisions setting for them the specified public tasks with regard to regional and borderland policy;

- civil law agreements concluded by entities under their capacity to incur civil law liabilities.

Depending on regional and local government level, international cooperation undertaken by Polish regional and local authorities looks as follows:

Voivodship - regional and local government

Provisions concerning voivodship - regional and local government tasks permit to take up cooperation with regional communities of other countries – but only with entities that are regional and -local government entities or public administration bodies of local or regional level.

Agreements concluded by a voivodship regional and local government may be related only to voivodship tasks, i.e. in respect of the Financial Mechanisms they do not permit to conclude cooperation agreements whose subject would concern the following areas: implementing the Schengen provisions, supporting the Schengen National Action Plans, strengthening the judiciary and technical assistance in implementing the *acquis*.¹ When concluding a regional cooperation agreement, the voivodship regional and local government is required to obtain consent of the Minister appropriate for foreign affairs.

As regards the foreign cooperation policy, the decisive body of the voivodship – the Voivodship Assembly shall adopt “*Priorities for foreign cooperation of the voivodship*”, a document specifying chief objectives of foreign cooperation, geographic priorities for future cooperation and plans to join international regional associations.

Municipal authorities

There are no obstacles² for a municipal authority or its organisational entities to conclude civil law agreements with regional and local government entities from EEA countries, including EU member states, being a basis of application for the Mechanisms’ for joint projects falling within the priority areas of the Financial Mechanisms except the following: implementing the Schengen provisions, supporting the Schengen National Action Plans, strengthening the judiciary and technical assistance in implementing the *acquis*.

Cooperation (partnership) agreements concluded by a voivodship or municipal authority prior to submission of an application will be gratuitous in nature, as the request for support under the Financial Mechanisms will not entail any benefits for a foreign public partner. If joint attempts to obtain support under Financial Mechanisms are successful, the voivodship regional and local government, in order to

¹ Unless the tasks regarding these areas are transferred to the voivodship by way of agreement by the relevant state administration bodies.

² Due to the very broad powers of the municipality as regards the implementation of public tasks, the municipality (or entities thereof) may undertake any task that serves the realisation of collective needs of the regional and local government community, unless the performance thereof is reserved to the jurisdiction of other bodies. The municipal authority is bound to perform tasks serving to satisfy the needs of the local government community, which constitute the municipality’s own tasks.

acquire ability to transfer funds to a foreign public partner, must use one of the solutions described below

Poviat regional and local government

A poviat regional and local government does not have the same grounds as the voivodship or municipal authority for undertaking regional cooperation. In the light of poviat's powers, contained in the *Act on poviat local government*, poviat has no grounds for undertaking bilateral cooperation, the only possible poviat's engagement in transnational co-operation is provided by art. 75(a) of that Act, which states that a poviat may enter into international associations of local and regional communities on the principles set out in the *Act on the rules by which regional and local government entities enter into international federations of local and regional communities*.

For a poviat, the only possibility of forming transnational partnerships is to join international federations and apply for support under the Financial Mechanisms within federation.

All regional and local government entities

Apart from the bilateral co-operation which can be undertaken by the regional and local governments of voivodship and municipal authority pursuant to art. 2 of that *Act on the rules by which territorial regional and local government entities enter into international federations of local and regional communities* all regional and local government entities may enter into federations and participate in them within their tasks and powers, acting in accordance with Polish internal law, the foreign policy of the State and its international obligations. Regional and local government entities may initiate transnational co-operation and decide on the form in which such co-operation will take place.

Federations are organisations, unions and associations set up by local communities of at least two countries in accordance with their internal law. Hence, cooperation between Polish regional and local government entities and entities from other countries may occur in the legal form of an association, union or inter-municipality agreement.

In practice, the creation of unions will be pointless. Art. 3 of the above Act expressly excludes the possibility of delegating public tasks to such a federation.³ On the other hand it is practical to create an association or to conclude an agreement and take up implementation of a joint „umbrella”-type project, under which each member of the federation will act to perform its own public tasks in implementing its sub-project. The leader of the Partnership may be in such situation e.g. jointly created association (agreement) or one of the regional and local government entities forming it,

³ A regional and local government entity's accession to a federation can not imply the transfer of the following to the federation or its members: performance of public tasks of the entity, its real estate or property rights to intangible assets .

however in the latter case it would be much more difficult to transfer tasks and funds to other members of the association (agreement).

Expenditure of funds

The financing of tasks in respect of international co-operation, arising from an agreement concluded by a voivodship or municipal authority with a foreign public entity may take place through award of a public contract by regional and local government entity or through awarding a grant.

A regional and local government entity may commit itself to finance a task by co-operation agreement – namely to transfer the funds to the entity indicated in the agreement, in order to perform their joint task or to perform a specified task serving the objectives of the agreement.

In the first case, the project will be financed through transferring a special grant to the entity indicated in the agreement, pursuant to art. 69 (4)(1)(d) of the *Act on public finances*. In accordance with this Act, subsidies are awarded by regional and local government entities on the basis of an agreement concluded between that entity and the entity who will perform the tasks specified in the agreement. An agreement on award of a grant should contain a detailed description of the task and the deadline for its performance, the special grant due to the entity performing the task with the way of payment, means of controlling the performance of the task and the way of settling the awarded special grant as well as the rules for the return of any unused amount, as required by art. 71 (2) of the *Act on Public Finances*. If the regional and local authority applies for the grant under the Mechanisms, it shall be discharged from public procurement regulations as to selection of economic operators. In the event that regional and local government entities join or form an association being a federation, public finance sector entities may participate in the costs of a task performed by the federation exclusively through financing – by awarding the association with a special grant. A special grant, due to the contractor's legal status (association), will be awarded under art. 69 (4)(1)(d) of the *Act on public finances*, subject to the conditions required by art. 118 of the *Act on Public Finances*.

CONCLUSIONS

- 1. Under the Financial Mechanisms, regional and local-government entities may undertake cooperation with their counterparts in other countries, subject to the rules of the Polish law.*
- 2. Transnational co-operation between public entities may be based on public law provisions or a civil law agreement.*
- 3. In order to constitute a basis for transferring funds, an agreement concluded with a foreign public entity must have the form of a public procurement contract or of a grant agreement. A grant agreement may be preceded by a gratuitous agreement at the partnership formation stage. For this reason, this agreement is recommended.*

4. *Co-operation between Polish regional and local government entities and entities from other countries undertaken on the basis of public law provisions may occur in the legal form of an federation-association, union or inter-municipality agreement. However, this route is less effective and more difficult as regards financing the tasks. The easiest form as regards the financial aspect is in this case financing tasks performed by an federation, since the financing takes place on the basis of a grant agreement concluded between the administration entity and the federation.*

2. Public-private partnership

The Act on public finances provides for two methods of financing the performance of public tasks:

- a) payment of remuneration for a public procurement contract performed,
- b) awarding a special grant for financing or additional financing of another entity's performance of a public task falling within the tasks of the public finance sector entity that awards a grant.

Furthermore, the form of cooperation of the public and private entities is specified by the Act on public-private partnership (PPP).

Public and private entities interested in the joint performance of a project financed from funds of the Financial Mechanisms may act in any legal and organisational form: a consortium, company, commercial law company or on the basis of a public-private partnership agreement.

They may also use other forms of cooperation – agreements, public procurement agreements, commercial law companies acting as joint-venture between public and private entities in the sector of public utility services.

Private entity

A private entity is an entity not encompassed by the public finance sector, which may be a company but may also be a non-profit entity.

The *Public-Private Partnership Act* enumerates the following as private partners:

- a business entity within the meaning of the Act of 2nd July 2004 *on the freedom of commercial activity* (Journal of Laws of 2004 no. 173 item 1807)⁴,
- non-governmental organisations,
- a church or other religious association,

⁴ i.e. a natural person, legal person or organisational entity without legal personality, to which a separate statute confers legal capacity if it conducts business activity in its own name.

- foreign entities, if they are business entities within the meaning of the law of the country of registration and satisfy the conditions to perform business activity laid down in national provisions.

In the light of the above-mentioned provisions, a commercial law company in which all or the majority of the shares are owned by the State Treasury or a regional and local government entity, may also qualify as a private entity in a public-private partnership.

Pursuant to the *Act on public finances* a commercial entity is the same as a business entity within the meaning of the provisions of the *Act on the freedom of commercial activity*.

As non-commercial entities, *The Act on public finances* regards non-profit entities external to public finance sector, giving as an example foundations and associations. Furthermore, the *Act on the voluntary work and activity for public benefit* enumerates in addition as such: non-governmental organisations, church legal persons, regional and local government entity associations, political parties, trade unions, employer organisations, professional regional and local governments and sports companies operating on the basis of regulations on physical culture and others

2.1 Rules of selecting entities performing public tasks on the basis of the Public Procurement Law.

Towards the award of public procurement contracts, the public finance sector entities implement procedures laid down in the *Act on Public Procurement Law*. The selection of a private partner by a public finance sector entity in order to conclude an agreement on the joint performance of public tasks, if assumed that the agreement provides for remuneration and the tasks will be financed from public funds, is a commission to implement public tasks. In light of art. 28 (4) of the *Act on Public Finances*, a public finance sector entity is obliged to conduct proceedings to award a public procurement contract pursuing the provisions of the Act of 29th January 2004 – Public Procurement Law (Journal of Laws of 2004 no. 19, item 177 as amended). Pursuant to the Public Procurement Law, the obligation to apply the public procurement procedures refers to each expense **above 6 000 euro** (art. 4 (8) of the Act).

Proceedings to award a public procurement contract can be launched by any public finance sector entity (awarding entity) regardless of whether it has legal personality or not, and the contractor of the public procurement contract may be any entity satisfying the conditions for participating in proceedings of awarding a contract as specified by the awarding entity. Pursuant to art. 2 (11) of the Public Procurement Law, a contractor may be a physical person, a legal person or organisational entity without legal personality, provided that it has capacity to conclude a civil law agreement on its own behalf.

The basic procedures of awarding a public procurement contract are open tendering and restricted tendering preceded by a public announcement. Only in particular cases (listed in the Act) a public procurement contract can be awarded through another procedure. On commencing the proceedings, the awarding entity specifies the subject-matter and conditions of performing the future contract. The

awarding entity selects the contractor by assessing offers lodged in accordance with its pre-assumed criteria described in detail in the tender documentation. The procedure for selecting a partner arising from public procurement law is particularly appropriate for selecting private entities by public entities acting as the Partnership leaders. In each case, the application of the public procurement procedure should be preceded by an analysis of whether the task encompassed by the partnership cannot be financed by awarding a grant based on provisions of the *Act on public finances* or the provisions of particular acts (e.g. *Act on voluntary work and activity for public benefit*). Due to the nature and objectives of the partnership, the selection of a private partner in proceeding for the grant of a public procurement contract should be made **in restricted tender procedure**, which allows that the skills and experience of the contractor are assessed in the best possible manner, and hence makes it possible that the selected private partner is best suited to the needs of awarding entity.

2.2 Rules of selecting entities performing public tasks based on the Act on public finances (award of grants).

A grant is awarded depending on the status of the entity applying:

- a) by open selection of the best offer as comprehended by the provisions on public procurement;
- b) by application of the provisions of the *Act on voluntary work and activity for public benefit*), if the applicant is a non-profit entity
- c) on the principle of selection of the best offer, taking into account the provisions on public procurement, if the applicant is a profit-making entity, e.g. business entity.

The scope of the subject matter of cooperation, for which it is possible to award a special purpose grant as a form of allocating funds within a partnership, is limited by the scope of tasks of the public entity which is interested in undertaking co-operation. A public entity may award a grant for financing a project applying for financing under the Financial Mechanisms, if the objective of the implemented project falls within its scope of public tasks.

Apart from commissioning the performance of public tasks, a public finance sector entity not being regional and local -government entity may award a special-purpose grant to a business entity for the performance of an investment in the field of technical infrastructure and environmental protection of particular importance for the national economy. A special-purpose grant for financing the investment can not exceed 50% of the planned cost schedule value of the investment, unless separate provisions of law provide otherwise (art. 76 of the *Act on public finances*).

In the event of a business entity making a new investment, a special grant is awarded to the business entity under rules specified in the regulations on financial support for investments.

Depending on the type of public entity, the legal basis for awarding grants will be art. 69 (1)(4)(d) related with art. 71 of the *Act on public finances* or art. 69 (1)(4)(d) related with art. 118 of the *Act on public finances*.

The way of awarding grants does not depend on the type of commissioned public task. Regardless of the subject-matter thereof, a public finance sector entity is obliged to sign a grant agreement, in accordance with the procedures set out in the *Act on voluntary work and activity for public benefit*.

Pursuant to art. 5 (4) of the (*Act on voluntary work and activity for public benefit*) ordering the performance of public tasks as commissioned tasks may take a form of entrustment with the performance of public tasks together with awarding grant for financing their performance, or supporting such tasks together with awarding grant for additional financing of their performance and takes place after having conducted an **open competition of offers** submitted by entities interested in performing the task, unless separate regulations provide for a different means of commissioning.

The open competition for offers must be preceded by a public announcement, which should give information about the type of tasks, amount of the public funds earmarked for performance of this task, the rules for awarding grants, deadlines and conditions for implementing the task, deadline for submitting the offers as well as the deadline, mode and criteria applied in selecting the offer.

An agreement on financing of the task, concluded as the result of the open competition for offers, should contain a detailed description of the task and deadline for its performance, the special-purpose grant due to the entity performing the task and the mode of payment, means of controlling the performance of the task and of the way of settling the special grant awarded, as well as the rules for the return of any unused amount.

In the case of a regional or local government entity, commissioning the performance of a public task by means of awarding a grant, apart from art. 92 of the *Act on public finances*, is laid down in art. 118 (1) of that Act.

Regional or local -government entity may award a grant for public purposes related to performance of its tasks, if the tasks will be performed by **non-profit entities not belonging to the public finance sector**.

Such specification of the entities eligible to apply for award of a grant means, that as regards the entities eligible for a grant from other public finance sector entities, the possibility of awarding the grants by regional and local government entities is subject to further limitation in terms of possible recipients.

Indicating the *non-profit entities* eliminate in principle business entities from those who are entitled to apply for a grant.

Commissioning of a task and award of a grant take place in accordance with provisions of the *Act on voluntary work and activity for public benefit*., and if it concerns public tasks other than those set out in the Act, the commissioning of the task and award of a grant take place on the basis of an agreement between the regional and local authority and the entity that will perform the task, unless the form of

the procedure for awarding a grant, way of settling it and means of inspecting the task commissioned, were specified by resolution of a decisive body in regional and local government entity whose task the grant concerns.

Art. 118 (2) means that a regional and local government entity, as opposed to other public finance sector entities, when awarding subsidies for public tasks other than enumerated in art. 4 (1) of the *Act on voluntary work and activity for public benefit*,⁵ may determine the rules for awarding a grant in the grant agreement or, specify the procedure of selecting the recipient by resolution of the decisive body other than open competition procedure referred to in the *Act on the voluntary work and activity for public benefit*.

2.3 Rules of selecting entities performing public tasks on the grounds of the Public Private Partnership Act

Public-Private Partnership in the sense of the *Public-Private Partnership Act* (PPP) is co-operation between a public entity and private partner, in order to implement a public task, which may take place

⁵ **Art. 4. 1.** The sphere of public tasks referred to in the act, includes tasks that concern:

- 1) social assistance, including assistance to families and persons in a difficult situation and equalling opportunities for such families and persons;
- 1a) ensuring organised care to former professional soldiers who have obtained a right to a military pension or military invalidity pension, war and military invalids and combatants;
- 2) charitable activity;
- 3) maintaining national traditions, supporting “Polish identity” and the development of national, civic and cultural consciousness;
- 4) activity in favour of national minorities;
- 5) health protection and promotion;
- 6) acting on behalf of disabled persons;
- 7) promotion of employment and vocational stimulation of persons without work and threatened with redundancy;
- 8) promoting and protecting women’s rights and activity in favour of equal rights of women and men;
- 9) activity in support of economic development, including the development of enterprise;
- 10) activity assisting the development of local communities and societies;
- 11) science, education, upbringing;
- 12) sightseeing and recreation for children and young people;
- 13) culture, art, protection of cultural goods and tradition;
- 14) promoting physical culture and sport;
- 15) ecology and protection of animals and protection of natural heritage;
- 16) public order and safety and counteracting social pathology;
- 17) disseminating knowledge and skills for national defence;
- 18) promotion and protection of human freedoms and rights and civil freedoms, and activities assisting the growth of democracy;
- 19) life saving and protecting the citizens;
- 20) assistance to the victims of disasters, famines, armed conflicts and wars both nationally and abroad;
- 21) promotion and protection of consumer rights;
- 22) actions in favour of the European integration and development of contacts and cooperation between societies;
- 23) promotion and organisation of volunteer work;
- 24) activity assisting non-governmental organisations and the entities referred to in art. 3 (3) technically, in terms of training or information or financially, to the extent set out in points 1-23.

if it is more beneficial to the public interest than other ways of implementing the venture.⁶ Lack of necessary implementing regulations to the Act, which would indicate the way of determining the risk as well as conducting the advisability analysis of creating a Partnerships, hinders the use of the Act when implementing public sector tasks.

The initiative for implementing each venture in the PPP system may come from either the public or private entity. A private entity interested in implementing a given venture within a public-private partnership, may submit an application to a public entity with a proposal to implement this venture. However, such an application does not release the public entity from the duty to select a private partner by procedures anticipated in the PPP Act. This means that the private partner's application does not guarantee its participation in the venture to be performed.

Furthermore, acting both on its own initiative or in response to an application made by a private entity, the public entity must prepare an analysis of the venture in order to determine its efficiency and related threats (e.g. influence of performance of the venture on the level of public debt etc.), before it makes a decision to perform the venture under public-private partnership.

If the analysis conducted indicates that the venture, requires, even if in part, to be financed from the state budget, the consent to implement the venture must be given by the Minister appropriate for public finances.

Taking a decision to perform the venture within the PPP system, opens the next stage of the proceedings , i.e. the selection of a private partner.

As to the selection of a private partner, the provisions of the Act – *Public Procurement Law* apply accordingly. This means that this process runs in accordance with the procedure described in the Public Procurement Law, subject to the exceptions previewed by the PPP Act.

Among others, the following provisions do not apply here: provisions on the conditions to apply the negotiated procedure with publication, provisions on the award of so-called „additional single-source procurement” and provisions on the obligation to obtain the consent of the President of the Public Procurement Office to conclude a contract for more than 3 years.

The selection of a private partner, like in proceedings to award a public procurement contract, is made on the basis of the offer to implement a project submitted by this partner.

In the event of particularly complicated projects or projects requiring to apply innovative solutions, the public entity may, on equal terms, reimburse to all entities participating in the project a part of costs incurred by them for preparing the offer.

⁶ Public entities commencing cooperation on the basis of a public-private partnership agreement include the public finance sector entities listed in art. 5 of the *Act on Public Finances*, with the exception of the Social Insurance Agency (ZUS), Agricultural Social Insurance Funds along with the funds they manage as well as the National Health Fund.

The procedure of forming a public – private partnership ends by concluding an agreement between the public entity and the private entity selected.

The subject-matter of the public-private partnership agreement is the private partner's implementation of a project on behalf of the public entity. Pursuant to art. 4 (4) of the *Public-Private Partnership Act* such a project may take the form of:

- designing or implementing an investment within performance of a public task;
- rendering public services for a term exceeding 3 years, if it includes exploitation, maintenance or management of an asset necessary in this respect;
- actions in favour of economic and social development, including revitalisation or development of a town, a part thereof or other area, conducted on the basis of a project submitted by a public entity or related to its design by a private partner, if the private partner's remuneration will not take a form of a sum of pecuniary payment made by the public entity;
- a pilot, promotional, scientific, educational or cultural project, assisting the implementation of public tasks, if the majority of the private partner's remuneration will mostly come from sources other than funds of the public entity.

From the perspective of the priority areas of the Finance Mechanisms, the definition of a project contained in the *Public-Private Partnership Act* poses no restriction on public entities' use of this form of cooperation when implementing projects applying for financing from the *Mechanisms'* funds with the exception of implementing the Schengen provisions, supporting the Schengen National Action Plans, strengthening the judiciary and technical assistance in implementing the *acquis*.

The agreement on public-private partnership lays down, in particular:

- the objective and subject-matter of the project and a schedule for its implementation;
- the total value of anticipated resources for implementing the whole project being the subject-matter of the agreement, regardless of their source of origin;
- obligation of the private partner to incur, in whole or in part, the outlays on implementing the project or ensuring that such outlays shall be borne by third parties;
- obligations of the public entity, including the size, rules and deadlines for making its contribution, if such a contribution is anticipated, and the rules of disposing this contribution

The public-private partnership agreement may provide that, for the purposes of its performance, the public entity and private partner will form a joint-stock company.

2.4 Public-private social partnership

The notion of a public-private social partnership under the *Financial Mechanisms* relates to co-operation in which a public entity co-operates with a private entity from so-called “third sector” – a social organisation or non-profit organisation, as termed by the *Act on Public Finances*.

Scope

Due to the types of priority areas of the *Financial Mechanisms* it will not be possible for social public private partnerships to implement projects in all areas of the *Mechanisms*. It stems from the fact that such form of performing a project must be concluded within the priority areas specified in the *Mechanisms* and within the scopes of tasks commissionable to third-sector entities specified in Polish law.

An analysis of the priority areas of the *Financial Mechanisms* and a comparison thereof with art. 4 of the *Act on voluntary work and activity for public benefit*, which enumerates the public tasks encompassed by cooperation between public administration bodies and NGOs or other social organisations, leads to a conclusion that co-operation with third sector entities will be possible for implementing the projects of the following scope:

- environmental protection and ecological education,
- science, education, culture and protection of cultural goods and tradition,
- development of local communities and societies; promotion of contacts and cooperation between societies
- projects that develop cooperation between regional and local -government entities and non-governmental organisations.

2.4.1 Co-operation with organisations of public benefit

The rules of performing public benefit activity by public benefit organisations and the rules of benefiting from such activity by public administration bodies in order to perform public tasks are regulated in the *Act on voluntary work and activity for public benefit*. Pursuant to art. 3 (2) of the above Act, non-governmental organisations are legal entities without legal personality created under the provisions of relevant acts, including foundations and associations, which are non-profit entities outside the public finance sector. Apart from NGOs, public benefit activity may be conducted by legal persons and organisational entities operating on the basis of regulations concerning relations between the State and the Catholic Church in the Republic of Poland, relations between the State and other churches and religious organisations and guarantees of the freedom of conscience and religion, if their statutory objectives include public benefit activity, as well as by associations of regional and local

government entities. Organisations conducting public benefit activity may apply to be granted the status of a public benefit organisation, provided that they satisfy the conditions set out in art. 20 of the Act.

The subject-matter of co-operation between a public administration body and an organisation conducting public benefit activity is the latter's performance of the public tasks of an administration body – its own or commissioned/delegated to it by way of agreement.

In the case that partnerships are created to implement projects supported from the *Financial Mechanisms*, public entities may select private partners through provisions of the *Act on voluntary work and activity for public benefit*, if the tasks encompassed by the partnership are identical to the tasks of the public entity (its own commissioned tasks or delegated tasks) and provided that the organisation conducting the public benefit activity is able to perform such task properly. The delegation of a task to a public benefit organisation may not, pursuant to art. 11 (4) of the above act, entail worse results than other forms of performance thereof. Along with delegating the task through agreement the same agreement awards the organisation a grant to implement the project.

Means of selecting a partner

A partner – third sector entity is selected by conducting an **open competition of offers** lodged by entities interested in performing the task. In order to select a partner, instead of an open competition, a public administration body may also conduct proceedings to award a public procurement contract.

A non-governmental organisation and other entities conducting public benefit activity may, at their own initiative, submit an offer to implement public tasks, including those being currently implemented differently, by agents including also administration bodies (art. 12 section 1 of the Act).

If such an offer is submitted, the public administration body is required to consider it and, if it deems advisable to delegate or support the performance of a task it will organise an open competition.

The open competition of offers must be preceded by a public announcement, which should contain information about the type of tasks, amount of the public funds assigned for performance of this task, the rules of awarding subsidies, deadlines and conditions for implementing the task, the deadline for submitting offers and the deadline, mode and criteria applied in selecting the offer.

An offer submitted in the competition should contain, at the very least, the detailed material scope of the public task proposed to be implemented, the deadline and place of implementation, a calculation of anticipated costs, information on earlier activity of the applicant in the area related to the task, information on the assets and human resources held that ensure the performance of the task, including the amount of financial funds obtained from other sources to implement the given task, and a declaration on intention to perform the task either gratuitously or for a payment.

The public administration body considering the offers is obliged to assess the feasibility of implementing the task by an organisation conducting public benefit activity, taking into account the

presented calculation of implementation costs, also in relation to the material scope of the task and the share of public funds earmarked for implementation. As a result of the open competition of offers, when receiving a commission to implement a public task, the organisation conducting public benefit activity concludes an agreement with the administration body on delegation of the task or an agreement on assistance for its implementation, and the public administration body commits itself to transfer appropriate public funds to implement the task as a grant. Pursuant to art. 71 of the *Act on Public Finances* such an agreement should contain a detailed description of the operation and deadline for its execution, the special grant due to the entity performing the task and the mode of payment, means of inspecting performance of the task and the way of settling the special grant awarded as well as the rules of return of any unused amount.

In the open competition, apart from the *Act on voluntary work and activity for public benefit*, the provisions of the ordinance of the Minister of Economy, Labour and Social Policy of 29th October 2003 *on a template of an offer to implement a public task, framework template of an agreement to perform a public task and template of a report on the performance of such task* (Journal of laws of 2003 no. 193 item 1891) also apply.

Legal basis and the form of transferring funds

The grant for the entity which conducts activity for the public benefit that has concluded an agreement on delegating the task or an agreement on the support for its implementation, is awarded by public administration body on the basis of art. 69 (4)(1)(d) of the *Act on Public Finances*, as it is indicated in art. (2)(1) of the *Act on voluntary work and activity for public benefit*.

2.4.2 Co-operation with other organisations from the non-profit sector

As the provisions of the *Act on voluntary work and activity for public benefit* indicate, the procedures for co-operation laid down in this act do not apply to co-operation between public finance sector entities and political parties, trade unions and employers' organisations, professional regional and local governments, authorities and foundations, whose sole founder is the State Treasury or a regional and local government entity, unless separate provisions provide otherwise as well as to co-operation with companies acting on the basis of provisions on physical culture.

In the absence of specific provisions (which does not apply for example to sports companies) the general provisions on subsidies of the *Act on Public Finances* apply to co-operation between these entities and public sector finance entities, i.e. the above-mentioned art. 71 of the *Act on Public Finances* which provides that entities that do not belong to the public finance sector, including foundations and associations, may obtain grants to perform commissioned tasks (the provisions of the *Act on voluntary work and activity for public benefit* apply accordingly to the conclusion of any agreement) and in the event of co-operation with local government entities, art. 118 of the *Act on Public Finances*. Pursuant to art. 118 (2) a task is commissioned and a grant granted in accordance

with the provisions of the *Act on voluntary work and activity for public benefit* , and if it concerns public tasks other than those set out in the Act, the task is commissioned and grant awarded on the basis of an agreement between the regional and local government entity and the entity that will perform the task, unless the form of the procedure for awarding a grant, means of settling it and means of inspecting the commissioned task were specified by a resolution of the decisive body of the regional and local government entity whose task the grant concerns.

CONCLUSIONS

- 1. The public entity and private entity should be defined on the basis of art. 5 of the Act on Public Finances. The entities specified therein will be deemed public entities, whilst all others will be treated as private entities.*
- 2. Co-operation with a private entity may take place on the basis of selecting thereof on the grounds of the Act - Public Procurement Law, the Public Private Partnership Act or by award of a grant based on the grounds of the Act on Public Finances or the Act on voluntary work and activity for public benefit.*
- 3. The procedure of selecting a partner arising from public procurement law is especially appropriate for public entities leading the Partnership when selecting private entities. However, due to its objective (in particular the selection of entities to perform tasks of commercial nature), its run should be preceded by an analysis of whether the task encompassed by the partnership cannot be financed by award of a grant based on provisions of the Act on Public Finances or the provisions of specific acts (e.g. the Act on the voluntary work and activity for public benefit).*
- 4. The Public-Private Partnership provisions on selecting a private partner may apply if it is more beneficial to the public interest than other means of implementing the venture. Any decision on selecting a partner, based on the provisions of this act, should always be preceded by an analysis of the efficiency of means by which the task will be performed. The lack of necessary executive provisions to the Act, which would indicate the means of determining the risk and conducting an advisability analysis of creating a Partnerships, hinders the use of the Act when implementing public sector tasks.*
- 5. A public entity may award a grant for financing a project applying for the Financial Mechanisms, if the objective being served by implementation of the project is included in public tasks of that entity, with the same applying for a grant for implementation of an investment in technical infrastructure and environmental protection which is of particular significance for the national economy.*
- 6. One particular form of co-operation between public and private entities is a social public-private partnership established on the basis of provisions of the Act on the voluntary work and activity for public benefit, provided that the tasks encompassed by the partnership are identical to the tasks of*

the public entity and the organisation conducting the public benefit activity is able to perform such task properly. Then it can be selected to implement such task by way of an open competition of offers and obtain a grant for its implementation. Such a grant is provided on the basis of a civil law agreement subject to the provisions of the Act on Public Finances referring to minimum contents of such agreement.

II GUIDELINES FOR ESTABLISHING A PARTNERSHIP STRUCTURE

1. Creation of a national public-private partnership

1.1. Conclusion and implementation of an agreement or union with transfer of financial resources

Public finance sector entities to whom relevant material public-law provisions assign the implementation of public actions in the priority areas of the *Finance Mechanisms* may engage in creation of public-private partnerships (see chapter I point 1).

In order to undertake mutual co-operation, public finance sector entities conclude an administration agreement which lays down the means of performing and financing the task and indicates the entities responsible for its implementation.

An agreement may indicate which of the co-operating entities will be delegated to perform a task, in such a case competence provisions regarding the possibility of delegating a task will apply or it may be decided that the task will be performed jointly.

In the light of applicable law, the agreement may provide that a task being the subject-matter thereof will be performed by one way of the following:

- individually by the entity indicated in the agreement to perform the task;
- the entity that was appointed in the agreement to perform the task commissions the entire performance thereof to other entities that are not parties to the agreement;
- the parties to the agreement commission the entire performance thereof to other entities that are not parties to the agreement;

If an agreement between public finance sector entities on delegating the performance of a task appoints one of them as the entity obliged to perform the task, at the same time requiring other entities to provide such entity with specified financial resources, the task forming the subject-matter of the agreement will be performed by using financial resources of all parties to the agreement and by human resources of the entity delegated for this task.

If municipal authorities create an inter-municipal union to perform a joint task, the task will become the union's task, and the union shall bear full liability for its performance.

The delegation of a task to such entities (a public finance sector entity or union) together with transfer of budget funds thereto for financing such task, means that the entity appointed to perform the task will take the disposal these funds. If the agreement permits, the entity appointed therein as the contractor for such task may, for the purpose of its performance, delegate the task to another entity which is not a party to such agreement and award a subsidy for its performance (e.g. on the basis of the *Act on the voluntary work and activity for public benefit* or on the basis of the *Act on Public Finances*). The entity performing the task may also purchase the supplies, services and building works necessary to perform the task, pursuant to the rules set out in provisions on public procurement, as it is required from public finance sector entities in art. 28 (3) of the *Act on Public Finances* .

In the case of performance of a task comprising of the purchase of a service, supply or building works the entities mentioned, acting as the awarding entities, will conduct proceedings for the award of a public procurement contract in conformity with the provisions of the Act of 29th January 2004 *the Public Procurement Law*.

1.2. Conclusion and implementation of an agreement or union without mutual transfer of financial resources

Public finance sector entities interested in co-operation on the implementation of a specified task, may also decide to perform jointly the tasks falling within the competence of these entities without transferring any funds between themselves deciding that each of them shall finance it from their own funds. In the case of using assistance funds from the *Financial Mechanism*, this form of cooperation will probably be rarely used. However, if it is decided to apply this form:

- each entity may independently award grants pursuant to the rules described above, delegating its own tasks and paying for them itself;
- each entity may individually award public procurement contracts;
- the entities-parties to the agreement may decide that the task shall be performed by awarding a joint public procurement contract, referred to in art. 16 (1) of the Act – *Public Procurement Law*. Pursuant to this provision, entities obliged to apply public procurement proceedings for the purchase of supplies, services or building works may make an agreement, conduct proceedings jointly and award a public contract, appointing from among themselves the awarding entity entitled to conduct proceedings and award the contract on their behalf. A public contract may be awarded in the case of any awarding entity and any contract – this provision does not require fulfilment of any conditions be in order to be applied and is applicable in any circumstances through an agreement of entities. The entity entitled to conduct the awarding procedure acts as the proxy of the remaining entities interested in the joint performance of the task and effectively incurs liabilities binding for all the entities

concerned. This way of performing a joint task requires no funds to be transferred between the budgets of entities interested in joint performance of the task – the entitled entity concludes the contract on the behalf of each of them, and each of the entities awarding the joint contract pays its share of the remuneration to the chosen contractor . When awarding a joint contract, in order to simplify contracting proceedings, entities may decide that each of them will take up proceedings to conclude the agreement individually and demand that partial invoices are issued for the performance of the task, in the amounts attributable to each of them, pursuant to the rules of co-financing the task laid down in the agreement.

1.1.3 Public-private partnership in which entities can not conclude an agreement or establish a union

Due to the varied forms of activity of public finance sector entities, it is not possible to conclude an agreement or establish a union in each case of mutual co-operation of entities of this sector. This possibility, for example, does not exist for co-operation between regional and local government entities and state legal persons established by statute. It is also does not exist for many entities without legal personality operating within the state treasury and in many other cases. The creation of unions and conclusion of agreements is possible only in situations laid down by provisions of material law.

In the event of delegating the tasks to entities with which, pursuant to special provisions, a public finance sector entity may not conclude an agreement, the provisions of *Act on Public Finances* apply, and consequently the provisions of the *Act on the voluntary work and activity for public benefit* indicated there.

Pursuant to art. 92 (5) of the *Act on Public Finances*, tasks financed from public funds should be commissioned through a selection of the best offer, taking into account provisions on public procurement, and in the case of non-profit entities by open selection of the best offer within the meaning of regulations on public procurement.

These provisions imply that when commissioning the performance of a specified public task, public finance sector entities **may award a public procurement contract** (pursuant to art. 28 section 4 of the *Act on Public Finances*) or **may award a special grant** for the performance of the task – on the grounds of the provisions of the *Act on Public Finances* related to specific provisions, appropriate for the subject-matter of the task (on the basis of art. 69 (1)(4)(d) in relation to art. 71 or art. 118 of the *Act on Public Finances*).

Art. 71 of the *Act on Public Finances* stipulates that public finance sector entities may award special grants to entities that do not belong to the public finance sector, earmarked for the performance of commissioned tasks, including foundations and associations, on the basis of agreements concluded

with taking into account the provisions of the Act of 24th April 2003 *on the voluntary work and activity for public benefit* (Journal of Laws No. 96, item 873), and the transfer of funds is made on the basis of a grant agreement.

Art. 118 (1) of the *Act on Public Finances* similarly regulates the situation of regional and local government entities - they can award a grant for public purposes related to the performance of the tasks of such entities, if the tasks will be performed by entities **not belonging to the public finance sector and operating on a non-profit basis**. The task is commissioned and the grant is awarded in accordance with provisions of the *Act on voluntary work and activity for public benefit*, and if the task concerns public tasks other than those set out in the Act, commissioning of the task and award of grant is made on the basis of an agreement between the regional and local government entity and the entity that will perform the task, unless the form of the procedure of awarding a grant, means of settling it and means of controlling the commissioned task were specified by resolution of the decisive body of the regional and local authority whose task the assistance concerns.

CONCLUSIONS

- 1. If public entities are able to conclude an agreement or establish a union, the recommended solution, for example in the event of implementation of a joint task by several municipal regional and local government entities, is to perform the task on the basis of an inter-municipal agreement, which is an uncomplicated form of co-operation, nevertheless sufficient for creating a project coalition (i.e. agreement on joint implementation of a task with clearly defined way of financing its components) for executing a project financed from the Financial Mechanisms.*
- 2. If the project is long-term, complicated or is based on the principle of project finance (i.e. it requires common steps to obtain external funds and gives rise to difficulties in settlement of own funds designated for the joint performance of a task) the optimal solution is to create an inter-municipal union. In such case, it is the union who becomes the entity performing the task and it is charged with the obligation to dispose the funds and perform settlements thereof appropriately.*
- 3. In the case of co-operation between regional and local government entities of various levels, an association is always permitted as a form for co-operation, since the power to form associations is provided in all Acts on regional and local government.*
- 4. Furthermore, in the event of delegating the tasks to entities with which, pursuant to specific provisions, a public finance sector entity may not conclude an agreement, the provisions of the Act on Public Finances apply, and consequently the provisions of the Act on the voluntary work and activity for public benefit to which it refers. Grants awarded on the basis of these acts may be directed not only to private entities but also to public ones.*

2. Creation of a transnational public-private partnership

In the case of transnational co-operation between regional and local government entities, the voivodship is particularly entitled to undertake such form of co-operation, due to its ability to conclude transnational co-operation agreements. Within municipal authorities' own tasks set out in the Act on municipal authorities, transnational co-operation between municipal authorities and regional and local government entities of EU or EEA countries is also possible on the basis of bilateral agreements.

Co-operation between Polish regional and local government and the entities from other countries may occur in the legal form of an association, union, inter-municipal agreement or a bilateral agreement. The specific rules of creating transnational partnerships and rules of transferring funds were described in chapter I point 1.2.

In this respect (due to the rules of functioning of the *Financial Mechanisms* indicating the preferred means of implementing the tasks specified therein) there are no obstacles to conclude these agreements directly with a selected regional and local government entity from a specified country. Such agreements, at the stage of application for an assistance, may be gratuitous in nature, and having obtained it, they may be transformed into a grant agreement entrusting the performance of certain tasks of a national entity to another entity (foreign) and transferring the grant for the implementation of the tasks covered by the agreement.

This legal form appears the most appropriate, although it is also possible to apply other forms of co-operation, as described in chapter I.

In addition, it should be stressed that in the case of multilateral projects engaging regional and local government entities of various levels from more than one country (i.e. not only Polish), the preferred solution is to create an association, on rules set out in the *Act on the rules on which regional and local government entities shall enter international federations of local and regional communities*.

3. Creation of public-private partnerships

The basis rules for creating public-private partnerships were described in chapter I point 2. In summary, it can be stated that:

1. Due to the circumstance that for the purposes of use of funds under the Financial Mechanisms, the term public-private partnership means each form of co-operation between public and private entities permitted by the national law of the Beneficiary State as a form of project implementation the procedure of selecting a private partner must depend above all on the character of the planned project, its duration and the organisational structure required for its implementation.
2. In order to ensure the operability of a project implemented by a partnership, the procedure of selecting the private partner must include an obligation to conclude

an agreement regulating relations between partners, if the project proposed by them is co-financed under the Financial *Mechanisms*.

3. If performance of the project entails creation of a commercial law company, and the project falls within the concept of a venture, the private partner should be selected in accordance with the *Act on public-private partnerships*, unless the regional and local government entity decides to privatise a communal company
4. Due to the provisions on state aid and the restrictions arising from the *Act on Public Finances*, the selection of a partner – business entity in a project, in which the partner is the beneficiary of the project or receives remuneration from the admitted grant, should be made by awarding a public procurement contract or using the procedure laid down by the *Public Private Partnership Act*, whereas a condition for the proper application of the PPP Act is the issue of necessary executive provisions to this act.
5. In the event of third-sector entities, due to the common features of the procedure of awarding a grant on the basis of the *Act on Public Finances* and the means of selecting a partner laid down in the *Act on the voluntary work and activity for public benefit* as a rule the procedure of the *Act on the voluntary work and activity for public benefit* should be applied, except for the cases where the public partner, due to the objectives of the project, will be interested in co-operation with a third-sector entity not having the status of a non-governmental organisation or not conducting public benefit activity in the meaning of the *Act on the voluntary work and activity for public benefit*.
6. The procedures of the *Act on Public Finances* have a wider scope of application as concerns the range of entities eligible for a assistance to perform a public task, hence they should be applied when the invitation to co-operate in a partnership is addressed to entities other than those conducting public benefit activity.

III. MANAGING THE FLOW OF PARTNERSHIP FINANCE FUNDS

Flow of financial resources

Pursuant to the *Rules and Procedures*, public-private partnerships may jointly implement projects financed under the Financial Mechanisms , implementing the principle of co-operation of various social partners. It is beneficial for the partnership to adopt the rule of joint action since the transfer of financial resources under the Mechanisms to the partnership means that:

- if for the purpose of creating a partnership, the public entity has used the procedure of the *Act on Public Finances (Act on voluntary work and activity for public benefit)*, each of the private partners operating jointly under the partnership receives part of the grant to finance the tasks whose implementation it has undertaken.

The private partner may perform its allocated task by itself or commission it to third parties. If it is necessary to commission a part of task to third parties, due to the status of admitted funds, the private partner will be required to award a public procurement contract to select the contractor;

- if for the purpose of creating the partnership, public procurement contracts are awarded, the partner shall receive remuneration corresponding to the part of the performed task allocated to it.

The private partner may perform the contract allocated to it by itself or commission a part of it to be performed by third parties (subcontractors). If it is necessary to commission a part of the contract to subcontractors, the private partner has no obligation to award a public procurement contract to select a subcontractor;

- if a public-partnership agreement is concluded the private partner receives remuneration for performing the project. The private partner may perform the contract by itself or commission a part of it to be performed by third parties (subcontractors).

If it is necessary to commission parts of the project being the subject-matter of a public-private partnership agreement to subcontractors, the private partner will be obliged to award a public contract to select a subcontractor, pursuant to the rules set out in art. 121 of the Act – Public Procurement Law.

The Financial Mechanisms provide for the safest means for transferring financial resources (from the perspective of minimising the risk of improper use of the funds transferred), namely the reimbursement of incurred and documented eligible expenses. The level of permitted advance payments is 10%, which in projects implemented by social public-private partnerships may cause difficulties in maintaining the liquidity of the project – third sector entities may not have sufficient resources of their own to cover on-going payments necessary for implementing a task being the subject-matter of the agreement.

IV RECOMMENDED PROVISIONS OF AGREEMENTS BETWEEN PARTNERS AS REGARDS THE PROTECTION OF PUBLIC FUNDS

A partnership agreement should:

- determine a joint strategy for implementing a project and comprehensively regulate internal relations of the partnership, including the scope of co-operation and responsibility within the contracted project(s);
- determine the rules of liability for public funds transferred to implement the project, notably in the case of a partnership anticipating financial management to be commissioned outside or obliging one of the partners to bear liability for the financial aspects of the project;
- the agreement should precisely specify the means and deadlines for performing tasks falling within the partnership and the transfer of funds for their implementation. The legislation offers a relatively broad scope of freedom for parties to the agreement in this regard. It is not prohibited to transfer funds for pre-financing the parts of the tasks (i.e. advances up to 10%) either in the case of grant agreements or a public procurement contract. However, an absolute obligation should be posed to construction such agreements so that the funds transferred on the basis thereof could be used exclusively for the purposes set out therein. Hence, it is necessary to safeguard the obligation to return funds transferred if they are not used in accordance with the agreement.
- indicate private partner's obligation to apply the public procurement law when ordering any services or supplies from entities outside the partnership, if the partnership was created by awarding a grant and the financial share of public funds in financing the order exceeds the value of 50% of the task performed by the partnership;
- indicate the private partner's obligation to apply the public procurement law when ordering any services or supplies from entities outside the partnership, if the partnership was created by concluding a public-private partnership agreement, pursuant to the rules laid down in art. 122 of the Act –on public procurement law;
- indicate the obligation to:
 - keep separate accounts concerning the implementation of the project, pursuant to the rules arising from the Act on Accountancy of 29th September 1994 (i.e. Journal of Laws of 2002, no. 76 item 694);
 - conduct a register of accounting events in a way that enables unambiguous identification of costs incurred for performance of the project and association of payments with expenditure under the project, as well as identification of evidence being the basis for effectuated payments

- reliable documentation of expenses with original bills, invoices and other documents constituting the basis for making payments;
- regulate provisions specifying the scope of amendments to the project being co-financed, including amendments to obligations or the division of tasks among partners;
- determine the rules for use and ownership of copyrights and other rights to works created by implementation of the project, and the rules of financing and obtaining copyrights from partners, if the project requires so.